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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether attorneys' fees are available under 42 U.S.C. § 1988 for administrative and other proceedings that are related to an action under 42 U.S.C. § 1983, when those proceedings are not required by statute or by court order?

2. Whether, if administrative or other collateral proceedings are conducted pursuant to a district court stay of the proceedings under 42 U.S.C. § 1983, attorneys' fees are allowable?

3. Whether attorneys' fees are available under 42 U.S.C. § 1988 for efforts expended in a district court Section 1983 action when the ultimate relief is formally obtained in collateral administrative or other proceedings?

PARTIES TO THE PROCEEDING

There are no petitioners or respondents in addition to those named in the caption and in footnote 1.

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No. _____

ROCK CREEK LIMITED PARTNERSHIP,

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PETITION FOR A WRIT OF CERTIORARI

Rock Creek Limited Partnership ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] Additional Respondents are Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh and Eliseo V. Samaniego, who were the individual members of the State Water Resources Control Board at the relevant times.

No party herein is a corporation, and there is no parent company or subsidiary required to be listed herein under Supreme Court Rule 29.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a) is reported at 972 F.2d 274. The opinion of the United States District Court for the Eastern District of California is unreported (App. 13a).

JURISDICTION

The court of appeals entered its judgment on August 5, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988), provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

In *California v. FERC*, 495 U.S. 490 (1990), after district court proceedings in a Section 1983 action had been stayed pursuant to court order, Petitioner prevailed on the underlying

merits of this litigation.[2] This Court held that the Federal Energy Regulatory Commission ("FERC") had properly found that the State of California could not bar Petitioner from operating under the terms of its federal license. This case presents the question of whether attorneys' fees are available under Section 1988 for the fees incurred in connection with such administrative proceedings even though those proceedings were not mandated by either statute or court order.

The Underlying Litigation

The controversy underlying the attorneys' fee claim arose from Petitioner's construction and operation of a small-scale hydropower project pursuant to a license issued by FERC on April 29, 1983. The FERC license set forth various operating conditions for the project, including the "bypass flows" which would be required in order to protect the stream's fishery (*Order Issuing License (Major)*, 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 62,137 (1983)).[3] The plant was constructed, at a cost of over $4.5 million, to operate most efficiently at the bypass levels set in the FERC license. (Excerpts of Record filed with Ninth Circuit ("ER") Tab 44 ¶ 6; Supplemental Excerpts of Record filed with Ninth Circuit ("ES") 18).

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[2] The circumstances surrounding the project and its early licensing history are described in detail in the Ninth Circuit's opinion in *California ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743 (9th Cir. 1989), and this Court's affirmance of that decision at 495 U.S. 490 (1990). Only the facts pertinent to the attorneys' fees claim are set forth above.

[3] Bypass flows represent the amount of water which must remain in the streambed during project operation and which cannot be diverted for power generation.

After initially issuing water appropriation permits consistent with the FERC license, in 1986 the Respondent California State Water Resources Control Board (the "State Board") convened hearings to determine whether, in order to protect the stream's fishery, Petitioner should be ordered to provide substantially higher bypass flows than FERC had established. (App. 2a). When the State Board rejected Petitioner's objections to any impairment of its federal license, Petitioner petitioned FERC for a declaratory ruling that the state could not bar Petitioner from operating under its federal license. (App. 2a). In March 1987 FERC issued a declaratory order ruling that the attempted state regulation was invalid and requiring Petitioner to observe the federal bypass flow requirement. (*Order in Response to Request for Declaratory Order and Providing for Hearing*, 38 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240 (1987)).

Although the State Board received a copy of the FERC declaratory order on March 16, 1987, three days later it issued Order 87-2, which was directly inconsistent with the FERC order and required Petitioner to observe bypass flow requirements as much as four times higher than FERC's. (ER Tab 39; ER Tab 41 ¶ 14; App. 2a-3a).

Two weeks later, on April 9, 1987, the Petitioner filed the civil action below against the State Board, raising claims, *inter alia*, under the civil rights laws, 42 U.S.C. § 1983. In the Section 1983 claim, the Petitioner alleged that Order 87-2 impaired the Petitioner's right to operate the project in accordance with its FERC license and the Federal Power Act, and constituted an unconstitutional taking of private property for public use. Petitioner sought to enjoin the State Board from enforcing Order 87-2 and from regulating, or asserting jurisdiction to regulate, project operations in a manner inconsistent with the FERC license. Petitioner also requested an award of reasonable attorneys' fees and costs under 42 U.S.C. § 1988. (ER Tab 1). Together with the complaint, Petitioner filed motions for a temporary restraining order and for a preliminary injunction,

seeking temporary relief against the enforcement of Order 87-2. (App. 3a)

Simultaneously with, or immediately after, the filing of this suit, the State Board moved to intervene in the Petitioner's FERC license proceeding, and for rehearing of the FERC declaratory order on the ground that FERC's assertion of exclusive authority to establish bypass flows was inconsistent with federal law. (ER Tab 41 ¶ 15; ES 93-4; *Order Denying Rehearing*, 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,198 (1987)). FERC granted intervention on April 28, 1987, and briefing of the merits proceeded thereafter. (ES 13).

Meanwhile, in the litigation below, the parties on April 16, 1987 stipulated, and the district court ordered, that Petitioner withdraw its motion for a temporary restraining order, and that the State Board refrain from enforcing Order 87-2 pending hearing on Petitioner's motion for a preliminary injunction. (ER Tab 11). The latter motion came for hearing on May 18, 1987. (Reporter's Transcript filed with Ninth Circuit ("Tr.") 1-22). The district court ruled that drought conditions (which precluded project operation under any bypass flow requirement) rendered a preliminary injunction unnecessary at that time, but invited Petitioner to reapply should conditions change and enforcement of Order 87-2 appear imminent. (Tr. 21). The court urged the parties to schedule summary judgment briefing of the merits for September 1987, in view of the likelihood that October would bring sufficient rain to make the project operable under the terms of the FERC license. *Id.* Pursuant to that suggestion, cross-motions for summary judgment on substantially all claims pleaded were fully briefed and were argued on September 18, 1987, but no decision was immediately forthcoming. (App. 4a).

On November 20, 1987, FERC denied the State Board's motion for rehearing of the declaratory order, and on December 21, 1987, the State Board petitioned the Court of Appeals for the Ninth Circuit for review of FERC's rulings.

(*Order Denying Rehearing*, 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,198 (1987); ES 135-41; *California v. FERC*, No. 87-7538 (9th Cir. June 6, 1989)).

The district court, which had still not ruled on the seven-month-old summary judgment motions, then indicated that it would stay the Section 1983 action if the state would agree to forego enforcement during the pendency of the FERC appeal. (ES 143). Accordingly, the State Board on April 14, 1988, wrote the district court as follows:

> 1. For the duration of the appeal in the *State of California v. Federal Energy Regulatory Commission*, 9th Circuit Docket No. 87-7538 action, the State Board agrees not to exercise its enforcement powers . . . against the [Petitioner] for any violation of the bypass flows set forth in the State Board's Water Right Order No. 87-2 for the protection of the fishery resources of Rock Creek.
>
> 2. The State Board agrees to the waiver of enforcement authority as described in paragraph 1 solely for the purpose of obtaining a stay of the trial court proceedings in this action and, thus, encouraging the prompt resolution of the [appellate proceeding].

(ES 143-44).

On April 22, 1988, the district court entered an order noting that the appellate proceeding "involves the same preemption issue raised by the instant action," and further noting that the "state has agreed to this waiver [of enforcement] for the sole purpose of obtaining a stay in the instant action." (ES 146-47). The court then vacated the cross-motions for summary judgment and ordered that all proceedings be stayed pending resolution of the appeal from the FERC order. (*Id.*)

On June 6, 1989, the Court of Appeals for the Ninth Circuit ruled in Petitioner's favor on the appeal. *California ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743 (9th Cir. 1989), *aff'd*, 495 U.S. 490 (1990). The State Board petitioned this Court for a writ of certiorari. (ER Tab 58). The parties stipulated in the action below to a continuation of the stay pending a decision on the petition for certiorari, noting that "[t]he nature of Supreme Court action on the State's petition will largely govern whether and to what extent the stay of proceedings in this case should be continued in effect after that time." (*Id.*)

This Court granted certiorari on December 4, 1989. 493 U.S. 991. On May 21, 1990, after briefing and argument, it held that the State Board had no authority to interfere with Petitioner's operation of the project at the bypass flow levels specified in the FERC license. This Court agreed that "allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would 'constitute a veto of the project that was approved and licensed by FERC.'" *California v. FERC*, 495 U.S. 490 (1990).

Following this Court's decision, the State Board at last abandoned its four-year effort to regulate the project, withdrew Order 87-2, and issued Order WR 90-10, which amended the project's water appropriation permits to conform with the bypass levels ordered by FERC. (ES 149-53).

On September 14, 1990, the district court granted the State Board's motion to dismiss the underlying case as moot, but retained jurisdiction to hear Petitioner's motion for an award of attorneys' fees. (ER Tabs 68, 69).

The Decisions Below on Petitioner's Fee Petition

After briefing, the motion for attorneys' fees was heard on January 22, 1991. (Tr. 70-76). The trial judge limited

Petitioner's presentation to whether "there [is] any causative relationship between this lawsuit and the result under which you were prevailing party in some other lawsuit." (Tr. 60). After allowing only a brief argument by Petitioner, the district court indicated that the parallel litigation in *California v. FERC* was "part of the same dispute, but it has nothing to do with this litigation." (Tr. 63). Ruling from the bench, the district court concluded that Petitioner was not a "prevailing party" within the meaning of 42 U.S.C § 1988, even though, concededly, "[Petitioner] has received the relief it sought in this case [i.e.,] the removal of the threat posed to [Petitioner's] federal rights by the California State Water Resources Control Board's order." (Tr. 64-65). On April 1, 1991, Petitioner appealed. (ER Tab 87).

On appeal, the Ninth Circuit bifurcated its consideration of the fee claim, addressing "that [part] relating to the activities before FERC, including the subsequent appeals" separately from "that [part] relating to efforts before the district court in this action." (App. 6a). With respect to the latter, the court observed that "[t]he Board did alter its conduct under the pressure of the lawsuit to the extent that Rock Creek did not need to obtain a preliminary injunction." (App. 12a). With respect to this portion of the fee application, the court remanded for further proceedings.[4]

With respect to the remainder of Petitioner's fee claim, the Ninth Circuit in effect affirmed the district court's decision to reject any fee award for "activities before FERC, including subsequent appeals." (App. 6a-10a). In denying fees for the administrative proceeding, the court of appeals expressly endorsed the district court's "causation" analysis, elaborating that "[w]hen [Petitioner] became aware of the Board's intransigent attitude

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[4] Despite its conclusion, the court simply remanded the fragment of the fee claim pertaining to "efforts in the Section 1983 action only," holding merely that "[i]t is possible that the [fees incurred in the] Section 1983 action [were] causally related to the practical outcome realized and the non-enforcement of the illegal [State Board] order." (App. 12a).

about its authority to override the FERC decision, it had at least two choices" -- "to attempt to get a definitive response from FERC," or "to proceed directly to court." (App. 9a, 10a). While acknowledging that Petitioner "cannot be faulted tactically for going to FERC first, as it did," and while further acknowledging that resort to FERC "became the vehicle for final resolution" only when "California intervened on behalf of the Board, and then appealed," the court of appeals nonetheless concluded that fees were unavailable since "[t]he two avenues open to [Petitioner had been] independent." (App. 9a). The court elaborated that the two avenues here simply were not sufficiently "interrelated and complementary," because "approach to FERC was not a condition precedent to [Petitioner's] entry to federal court," and because the FERC decision was not "required by . . . remand from the district court." (App. 7a-8a, 9a).

In so holding, the court of appeals was obliged to distinguish a line of decisions from this Court "sustain[ing] awards of attorneys' fees in administrative or state court proceedings outside the federal action itself." (App. 10a). Thus, the court noted that *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), in contrast to this case, involved a statute -- Title VII -- which contained statutory requirements for exhaustion of administrative remedies. (App. 7a, 9a). *Sullivan v. Hudson*, 490 U.S. 877 (1989), was viewed as not authoritative because the resort to administrative proceedings occurred pursuant to court order. (App. 7a-8a, 9a). *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), was said to be distinguishable on the ground that it involved administrative work which "was required before the party could succeed in federal court." (App. 8a-9a).

REASONS FOR GRANTING THE WRIT

This case involves a question of importance under a variety of federal fee-shifting statutes: whether attorneys' fees may be

awarded for closely related litigation which is required neither by statute nor by court order.

As discussed below, the decision of the Ninth Circuit conflicts directly with decisions of this Court over the past twelve years. Those cases hold that where, as here, collateral proceedings are intimately tied to resolution of the underlying litigation, and are necessary to the results Congress sought to promote through fee shifting, a fee award for work done in the collateral proceedings is required.[5]

The Ninth Circuit's decision, moreover, perpetuates a conflict among the circuits as to whether such fees for collateral proceedings may be recovered whenever the necessary "intimate tie" exists, or only when the administrative proceedings are required by statute or court order. Decisions of the First, Third and Seventh Circuits impose no requirement that the collateral proceedings be required by statute or court order, while the Ninth Circuit here and the Second, Fifth and Tenth Circuits hold that fees are recoverable only when there is a statutory exhaustion requirement or court order. The decision of the Ninth Circuit and other circuits following the same rule will severely discourage plaintiffs from voluntarily seeking resolution of their claims before administrative agencies or other alternative fora, and burden the federal courts with disputes that could more easily and expeditiously be resolved by an administrative agency or non-federal forum. The issue is important in a wide variety of federal litigation, and should be resolved by this Court.

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[5] The Federal Power Act clearly grants Petitioner rights enforceable under 42 U.S.C. § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The Ninth Circuit's decision is directly inconsistent with decisions of this Court.

This Court first considered the issue of recovery of attorneys' fees for collateral proceedings in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). In *Carey*, the plaintiff filed a charge with the Equal Employment Opportunity Commission, which was then forwarded to the New York State Division of Human Rights as required by § 706 of Title VII. 447 U.S. at 56-57. Although Title VII's period of "mandatory" federal deferral lasts only 60 days, plaintiff nonetheless pursued her state remedies over a three year period to a successful conclusion. *Id.* at 57-59, 62-64. During the pendency of these proceedings, plaintiff commenced a Title VII action in federal court. *Id.* at 58. Upon the conclusion of the state proceedings, all that then remained of plaintiff's federal action was her prayer for an award of attorneys' fees under Title VII's fee-shifting statute, a provision worded virtually identically to Section 1988. *Id.* at 59.

Carey held that Title VII's fee shifting statute *required* an award of fees for work performed in administrative and state court proceedings, without regard to the fact that the judgment on the merits of the employment discrimination claim actually had been obtained in the state administrative proceeding. 447 U.S. at 61-66, 68. *Carey* reasoned that "Congress's use of the broadly inclusive disjunctive phrase 'action or proceeding' [in the fee shifting provision] indicates an intent to subject the losing party to an award of attorney's fees and costs . . . for administrative proceedings"; and that that provision was clearly intended to "facilitate the bringing of discrimination complaints" so as to "vindicat[e] a policy 'of the highest priority.'" *Id.* at 61, 63 (citations omitted).

Furthermore, while *Carey* buttressed its holding with references to Title VII's "interrelated scheme" that "mandat[es]" initial resort to state remedies, the Court expressly noted that the period of mandatory deferral to state remedies lasted for only 60 days. 447 U.S. at 64-65. Nonetheless, the Court affirmed the award of fees for the entire three year state proceeding, which represented work consuming over eighty percent of the time Carey's counsel spent on the merits. *Id.* at 59, 68-70. Clearly, the compensation awarded in *Carey* included a great deal of work that was in no way "mandatory" when viewed by the standards applied by the Ninth Circuit below.

The Ninth Circuit, however, read *Carey* narrowly on the authority of *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985). In *Webb*, the plaintiff, a teacher alleging race discrimination, filed a Section 1983 action after five years of optional and unsuccessful litigation he had brought under state tenure law before a state administrative agency. 471 U.S. at 235-37. After the federal suit terminated in a consent order, plaintiff sought attorneys' fees under Section 1988 for the entire administrative action as well as for the two-year district court litigation. *Id.* at 237-38, 243. The Court affirmed denial of fees for the administrative proceeding, noting that the civil rights acts, unlike Title VII, do not expressly require initial pursuit of state remedies prior to bringing of federal court proceedings; and that, accordingly, "[b]ecause [42 U.S.C.] § 1983 stands as as an 'independent avenue of relief,'" the administrative proceeding "simply [did] not have the same integral function under § 1983 that state administrative proceedings have under Title VII." 471 U.S. at 240-41 (citation omitted). In *Webb*, however, the work left uncompensated wholly predated the filing of the federal civil rights action, and the proceedings were optional, totally unsuccessful, and brought to enforce state tenure rights rather than any right conferred by federal law. *Id.* at 236-37, 239, 241-43.

Moreover, even if *Webb* engendered lingering doubts about the continued applicability of fee shifting statutes to nonmandatory collateral litigation, the Ninth Circuit's reading of *Webb* simply cannot be reconciled with *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). In *Delaware Valley*, plaintiff brought suit under the Clean Air Act against the Commonwealth of Pennsylvania to require the Commonwealth to implement a vehicle emission inspection and maintenance program as required by the Act. A consent decree eventually was entered requiring the Commonwealth to establish an emissions program in ten counties and for the Pennsylvania Department of Transportation to seek legislation instituting a system under which the Commonwealth would contract with garage owners for the establishment of inspection stations. If the legislature failed to approve such a system, then the decree required the Department to promulgate regulations allowing the Commonwealth to certify a number of private garage facilities to perform the inspections. Implementation of the decree, however, proceeded less than smoothly, and plaintiffs participated in extensive post-decree litigation in various fora, for which they subsequently sought an award of attorneys' fees under the Clean Air Act's fee shifting provision. 478 U.S. at 549-53.

The Commonwealth challenged the district court's grant of fees, to the extent it pertained to what were alleged to be "only tangentially related state and federal administrative proceedings." 478 U.S. at 554. Specifically, fees had been awarded following entry of the decree for, *inter alia*, plaintiffs' monitoring of the defendant's performance of the decree; their submission of comments on proposed state regulations; their opposition to attempts by defendant during hearings before the Environmental Protection Agency to persuade that agency effectively to limit the reach of the consent decree; and their filing of an amicus brief in a collateral state proceeding brought by third parties challenging the State's right to enter into the consent decree. *Id.* at 550, 552-53. The Court affirmed the award of fees for all of this work.

None of the work at issue in *Delaware Valley* was required by statute or court order. 478 U.S. at 550, 552-53.[6] Indeed, nothing in the opinion suggests that the Court considered a statutory or judicial "mandate" as even a factor for consideration in deciding on a fee petition. Instead of adopting such a rigid and arbitrary test, the Court in *Delaware Valley* reasoned that, "[a]lthough it is true that the proceedings involved . . . were not 'judicial' in the sense that they did not occur in a courtroom or involve 'traditional' legal work such as examination of witnesses or selection of jurors for trial, the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success." 478 U.S. at 558. This reasoning is as fully applicable to the present case as it was in *Delaware Valley*. Indeed, in construing the Clean Air Act's fee-shifting provision, *Delaware Valley* expressly relied on the virtually identical language and purposes of Section 1988. *Id.* at 559. The Ninth Circuit's decision is fundamentally at odds with *Delaware Valley*.

The Ninth Circuit's approach is inconsistent as well with *North Carolina Dep't of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 15 (1986), in which the Court articulated a broad test for the allowance of attorneys' fees, observing that "[a] court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation. See *Carey*, *supra* (so holding under identical language of Title VII)."

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[6] *See also Delaware Valley Citizens Council for Clean Air v. Pennsylvania*, 581 F. Supp. 1412, 1429 (E.D. Pa. 1984)(expressly noting that plaintiffs sought compensation for "activities their attorneys performed in state court litigation and in regulatory actions, such activities not directly required by this court's Orders").

Finally, the Ninth Circuit's decision is inconsistent with *Sullivan v. Hudson*, 490 U.S. 877 (1989), in which the Court synthesized the teachings of its fee shifting cases to articulate the appropriate standard for determining the applicability of fee shifting statutes to collateral litigation. In *Sullivan*, the Court concluded that attorneys' fees should be awarded to a social security claimant under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988), for legal services performed during an administrative remand. While the case thus involved a collateral proceeding that was "mandated" by court order, the Court's discussion of its precedents was not confined to such facts. Instead, this Court observed that "[o]ur past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." 490 U.S. at 888.

Certiorari should be granted to resolve the conflict between the decision below and this Court's decisions.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

Despite this Court's decisions approving recovery under fee shifting statutes for closely related litigation, a conflict has developed among the circuits as to the availability of fees where such proceedings are nonmandatory.

On the one hand, the position taken by the Ninth Circuit below -- that fees are not awardable absent statutory exhaustion requirements or a mandatory court order -- is shared by at least three other circuits. For example, the Tenth Circuit in *Manders v. Oklahoma ex rel. Dep't of Mental Health*, 875 F.2d 263 (10th Cir. 1989), held that fees could not be awarded under Title VII for relief obtained in an optional grievance procedure created by

state statute because those proceedings were not mandated by statute: "Whether employees pursue the internal grievance procedure or not, they at all times have the right to file their cases with the Oklahoma Human Rights Commission, the Equal Employment Opportunity Commission or the Ethics and Merit Commission. Thus, the procedure is an enforcement mechanism additional to, not a precondition of, Title VII enforcement, and is not an integral part of the Title VII scheme." 875 F.2d at 267. The Fifth Circuit in *Arriola v. Harville*, 781 F.2d 506 (5th Cir.), *cert. denied*, 479 U.S. 820 (1986), and the Second Circuit in *Gerena-Valentin v. Koch*, 739 F.2d 755 (2d Cir. 1984), applied essentially the same analysis with respect to the fee-shifting provision of the Voting Rights Act.[7] In *Arriola* and *Gerena-Valentin*, plaintiffs successfully sued to enjoin implementation of redistricting plans that had not been approved. The plaintiffs in both *Arriola* and *Gerena-Valentin* then participated in preclearance reviews before the Justice Department, seeking changes to be made in the localities' proposed plans. It was these efforts for which plaintiffs sought, unsuccessfully, to obtain an award of attorneys' fees under the Act. In denying fees, *Gerena-Valentin* distinguished *Carey* on the ground that in that case, "the plaintiff was required by statute to exhaust state and local administrative remedies before resorting to

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[7] The Voting Rights Act requires state and local governments to obtain federal governmental approval of any change in a previously approved election plan, through, *inter alia*, submission of the proposed changes to the Justice Department for "preclearance." 42 U.S.C. § 1973c (1988). Where a locality proposes to conduct an election pursuant to an unapproved plan, the Act permits institution of a civil action to enjoin implementation of the plan. *Id.* Attorneys' fees are available under the Act to prevailing parties, other than the United States, "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973*l*(e)(1988).

litigation." 739 F.2d at 761. *See also Arriola*, 781 F.2d at 510-11 n.3.[8]

On the other hand, the First, Third, and Seventh Circuits do not view the absence of a statutory exhaustion requirement or court order as barring attorneys' fees for closely-related litigation. Thus, in *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983), a Title VII class action, plaintiffs sought attorneys' fees for their efforts "in several court and administrative proceedings, involving the . . . Departments of Labor, Defense and the Interior," to have the defendant employer debarred from federal contracting under Executive Order 11246.[9] 670 F.2d at 763. Plaintiffs launched these efforts when the Title VII action stalled following the death of the district court judge. *Id.* The Seventh Circuit awarded fees for the debarment initiatives, specifically rejecting the contention that fees are available only for "mandatory procedures," and noting that "the issues and factual background were the same for both the Title VII action and the enforcement of Executive Order 11246." *Id.* at 766. *See also Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985) (following *Chrapliwy*).

Similarly, in *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984), the First Circuit determined that fees should be awarded under

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[8] *Arriola* and *Gerena-Valentin* both reserved the issue of whether fees are available for "services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and where that work is *required* and *necessary* to resolve the issues of the independent lawsuit." *Arriola*, 781 F.2d at 507 n.1 (emphasis added). *See also Gerena-Valentin*, 739 F.2d at 759.

[9] Executive Order 11246 prohibits federal contractors from discriminating against employees on the basis of race, sex, or other impermissible grounds. The contractor can be debarred from its contracts and declared ineligible for future contracts in the event of noncompliance with the Order. 670 F.2d at 763 n. 1.

Section 1988 in a sex discrimination case for work plaintiffs performed in defending a state declaratory judgment action brought by defendants under state antidiscrimination laws seeking a determination that defendants had not engaged in discrimination. The First Circuit noted that "[t]he issues in the state suit were virtually the same as in the federal case." 728 F.2d at 22. Once again, there was no statutory exhaustion requirement and no court order committing the litigants to the collateral forum. Instead, the court of appeals reasoned that fees should be awarded because of the virtual identity of the issues and because "plaintiffs were forced to defend [the state court suit] lest they lose their § 1983 claim in the federal courts through collateral estoppel." *Id.* Accordingly, the court of appeals concluded that "defense of the state court action was a necessary part of plaintiffs' efforts to achieve their § 1983 goal [since] [i]t formed part of an 'action . . . to enforce a provision of sections . . . 1983 [and] 1985 . . . .'" *Id.* (citation omitted).

The Third Circuit has also held that fees under Title VII should be awarded for work undertaken in a collateral proceeding -- an arbitration under the nondiscrimination provision of a collective bargaining agreement -- even though that proceeding involved "an enforcement mechanism additional to, and not required by, Title VII's enforcement scheme." *Sullivan v. Commonwealth of Pennsylvania Dep't of Labor and Indus.*, 663 F.2d 443, 447 (3d Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *Sullivan* stressed that "an award of attorneys' fees under [Title VII] and its companion provision, 42 U.S.C. § 1988, is not limited to the situation in which the plaintiff prevails by a judgment in the Title VII action itself, by a favorable resolution of state administrative proceedings, or by a judgment in any other civil rights action. Rather . . . attorneys' fees are available whenever a civil rights action ultimately results in the plaintiff's having obtained relief, even when there are several links in the chain of events connecting the claim brought and the relief granted." 663 F.2d at 447.

Finally, the Eighth Circuit's rulings are in hopeless conflict regarding the availability of fees for nonmandatory collateral proceedings. Some decisions affirm such fee awards. *Bobbitt v. Paramount Cap Mfg. Co.*, 942 F.2d 512, 514 (8th Cir. 1991)(Title VII action; fees awarded for work performed in unemployment benefits proceeding because this work was "useful and substituted for work at the judicial stage that would have been ordinarily necessary to a successful outcome of Bobbit's civil rights claim"); *McDonald v. Armontrout*, 860 F.2d 1456, 1462 (8th Cir. 1988)(class action challenging constitutionality of prison conditions; Section 1988 fees awardable for investigative work arising out of a previous habeas corpus proceeding, since the work "obviated the need for comparable work in" the civil rights proceeding, and since it "contributed directly to [the] successful outcome."); *see also Jenkins v. Missouri*, 862 F.2d 677 (8th Cir. 1988)(affirming an award of attorneys' fees under Section 1988 for plaintiffs' unsuccessful lobbying to obtain passage of tax increases to fund a school desegregation remedy, over the school district's objection that the district, and not the plaintiffs, had submitted the levy proposals to the voters; the fee claimants had "stood to benefit" from their lobbying and had "performed a valuable and not unexpected role" in the election).

In another case, however, the Eighth Circuit has concluded that fees are not available under Section 1988 for collateral litigation where there was no exhaustion requirement. *Quinn v. Missouri*, 891 F.2d 190 (8th Cir. 1989)(denying a motion for rehearing of a denial of an attorneys' fees award, in view of the lack of any exhaustion requirement, where (i) the Section 1983 plaintiffs challenged the constitutionality of a provision of the Missouri Constitution; (ii) defendants filed a declaratory judgment action in state court for construction of the provision; (iii) plaintiffs counterclaimed in the state court action, and litigated the issue successfully to this Court; and (iv) the federal district court was ordered to abstain and to dismiss the civil rights action).

These decisions reflect a deep division among the circuits regarding the proper interpretation of the Court's holdings concerning the availability of attorneys' fees for nonmandatory collateral proceedings. The conflict can only be resolved by this Court.[10]

III. THE PROPER APPLICATION OF SECTION 1988 TO COLLATERAL PROCEEDINGS IS AN IMPORTANT AND RECURRENT ISSUE

Many other fee-shifting statutes contain virtually identical wording to that in Section 1988. Section 1988 was patterned after the attorney's fees provisions in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1988), 42 U.S.C. § 2000e-5(k) (1988), *as amended* Pub.L. 102-166, 105 Stat. 1075 (1991). The wording of Section 1988 is also essentially identical to the Voting Rights Act attorneys' fee provision, 42 U.S.C. § 1973(*l*)(e) (1988). Several other attorneys' fees statutes, while not identical to Section 1988, contain wording that, for many purposes, is indistinguishable. These include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d) (1988); the Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (1988); and the Copyright Act, 17 U.S.C. § 505 (1988). Because of the similarity in wording and purpose, authorities construing these statutes are often used interchangeably.

Moreover, as shown above, the availability of fees for collateral proceedings has been a recurrent problem arising with respect to application of Section 1988 and other fee shifting

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[10] With respect to the fees incurred in district court, this case presents the additional question of whether a further hearing is necessary to establish that the district court proceeding "caused" the result in the administrative proceedings. For the same reason that the fees incurred in the administrative proceedings are allowable, no such causation inquiry is necessary or appropriate with respect to the fees incurred in district court.

statutes. The decision below would substantially undermine the right to attorneys' fees by making the forum for resolution of the dispute all-important in many cases. This emphasis on forum selection will also erode the many prudential policies courts have established favoring deferrals to the decision-making processes and judgments of other tribunals and arms of government, such as the doctrines of primary jurisdiction and abstention. This approach will also encourage plaintiffs to litigate claims in federal court that could be better resolved in alternative proceedings.

The erosion of the right to attorneys' fees would be particularly serious in the context of Section 1983. Section 1988 was specifically designed to encourage the bringing of meritorious civil rights claims. The statute's legislative history makes clear that the civil rights laws "depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908-10. Moreover, because many, if not most, civil rights cases involve only injunctive relief, a fee award takes on heightened importance as the only means to recoup the costs involved in pursuing the litigation. In this connection, the fee award often may serve as well as the only deterrent to governmental invasion of private civil rights.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 3, 1992

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCK CREEK LIMITED PARTNERSHIP, a California limited partnership,	)	No. 91-15538
	)	D.C. No.
	)	CV-87-00523-LKK
	)	OPINION
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STATE WATER RESOURCES CONTROL BOARD, *et al.*,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Chief Judge, Presiding

Argued and Submitted
May 12, 1992 - San Francisco, California

Filed August 5, 1992

Before: Betty B. Fletcher, Cecil F. Poole, and
Thomas G. Nelson, Circuit Judges.
Opinion by Judge T.G. Nelson

OPINION

T.G. NELSON, Circuit Judge:

The California Water Resource Board (Board) imposed minimum flow conditions on a hydroelectric project inconsistent

with those contained in the project license issued by the Federal Energy Regulatory Commission (FERC). The position of the Board was rejected by this court in affirming a FERC declaratory order in *State of California, ex rel. State Water Resources Board v. FERC*, 877 F.2d 743 (9th Cir. 1989), and by the United States Supreme Court in *California v. FERC*, 495 U.S. 490 (1990). The project sponsor here appeals the district court's denial of an award of attorneys fees in its 42 U.S.C. § 1983 action filed shortly after the Board issued its order. We vacate the order and remand.

FACTS AND PROCEEDINGS BELOW

Rock Creek Limited Partnership (Rock Creek) is the project sponsor of a small hydroelectric project on Rock Creek, which is a tributary of the South Fork of the American River near Placerville, California. In April, 1983, Rock Creek received a FERC license, which established minimum flows past the project diversion of eleven cubic feet per second (cfs) May to September, and fifteen cfs October through April. The license permitted FERC to change the minimum flow following completion of long-term studies the licensee was to complete in conjunction with the California Department of Fish and Game.

In February, 1984, the Board issued a permit for the project with interim flows duplicating those of FERC. The permit reserved Board jurisdiction to set permanent flow rates after completion of the long-term studies. In 1986, the Board held hearings concerning the possible imposition of higher minimum flows, and rejected Rock Creek's objections based on its FERC license.

After the Board's rejection of Rock Creek's argument, Rock Creek filed a petition for declaratory order with FERC, seeking an order declaring that FERC's authority to set flow conditions at the project preempted the authority of the Board. In March, 1987, FERC issued an order as requested by Rock Creek, holding

that the Board "has no authority to set minimum flows for the project that conflict with those in the license. . . ." 38 FERC ¶ 61,244 (1987).

A few days after Rock Creek's receipt of the FERC order, the Board issued its Order No. WR 87-2, which set permanent flows of sixty cfs from March through June and thirty cfs July through February. The State of California then intervened in the FERC proceedings on behalf of the Board, challenging FERC's declaratory order. The result was a final FERC order rejecting California's position, which was affirmed on appeal to this court in *State of California ex rel. Water Resources Board v. FERC,* 877 F.2d at 750. The Supreme Court of the United States granted certiorari and affirmed in *California v. FERC,* 495 U.S. at 496.

In April, 1987, shortly after the Board issued Order No. 87-2, and contemporaneously with California's intervention at FERC, Rock Creek filed this action in the federal district court under 42 U.S.C. § 1983. Rock Creek sought to enjoin the Board from enforcing Order No. 87-2 and from regulating or asserting jurisdiction to regulate project operations or from interfering with the project's use of water rights for the project. The complaint included a request for attorneys fees pursuant to 42 U.S.C. § 1988. At the same time it filed the complaint, Rock Creek asked for a temporary restraining order and preliminary injunction against enforcement of Order No. 87-2.

The parties stipulated, and the district court ordered, that upon withdrawal of Rock Creek's motion for a temporary restraining order, the Board would refrain from enforcing Order No. 87-2, pending a hearing on the motion for preliminary injunction. Following hearing on that motion in May, 1987, the district court ruled that low flow conditions due to drought, which precluded project operation no matter what the minimum flow requirement was, rendered a preliminary injunction unnecessary. The court urged the parties to schedule a summary judgment hearing on the merits for September, 1987, in view of the potential for sufficient

rain to permit operation of the project. Cross-motions for summary judgment were briefed and argued on September 18, 1987. As part of the summary judgment proceedings, the parties stipulated that Order No. 87-2 was in effect and subject to enforcement.

The district court did not rule on the motions for summary judgment, but at a status conference in April, 1988, asked whether the Board would consider waiving enforcement actions against Rock Creek for failure to comply with the state mandated flows. Counsel for the Board stated in a letter to the district court:

> 1. For the duration of the appeal in the *State of California v. Federal Energy Regulatory Commission*, 9th Circuit Docket No. 87-7538, action, the State Board agrees not to exercise its enforcement powers . . . against the [project] for any violation of the bypass flow set forth in the State Board's water right Order No. 87-2 for the protection of the fishery resources of Rock Creek.
>
> 2. The State Board agrees to the waiver of enforcement authority as described in paragraph 1 solely for the purpose of obtaining a stay of the trial court proceedings in this action and, thus, encouraging prompt resolution of the . . . 9th Circuit action.

On April 22, 1988, the district court entered an order which noted that the appellate proceeding in the Ninth Circuit involved the same preemption issue raised by the action then pending in the district court, vacated the submission of the cross-motions for summary judgment and all stayed proceedings pending resolution of the appeal.

Following the 1989 decision of this court, the parties stipulated to continuation of the stay pending a decision on California's Petition for Certiorari in the United States Supreme Court. Following the Supreme Court decision, the Board issued Order

No. WR 90-10 which amended the project's water appropriation permits to conform with the bypass levels finally adopted by FERC.

In September, 1990, the district court granted the Board's motion to dismiss the case, but retained jurisdiction to hear Rock Creek's motion for an award of attorneys fees for its efforts in the FERC proceeding and in the district court. After briefing, the motion was heard in January, 1991, and the district court held that Rock Creek was not a prevailing party within the meaning of 42 U.S.C. § 1988.

> Although [Rock Creek] has received the relief it sought in this case, there is no causal link between this litigation and the relief. [Rock Creek's] goal when commencing this action was the removal of the threat posed to [Rock Creek's] federal rights by the California State Water Resources Control Board's order. This goal was achieved when the Board withdrew its order pursuant to the Supreme Court's ruling in *California v. FERC*, [495] U.S. [490], 110 S. Ct. 2024, 109 L.Ed. 474 (1990). This Court finds that the litigation in this Court has no causal relationship to the court's decision in *California v. FERC*, or the invalidation of the Board's order.

Rock Creek perfected a timely appeal to this court, contending that it was, in fact, a prevailing party and entitled to attorneys fees.

DISCUSSION

[1] Awards of attorneys fees pursuant to 42 U.S.C. § 1988 are reviewed for abuse of discretion, but any elements of legal analysis and statutory interpretation which figure in the district court's decision, and the legal standards applied by the district court, are subject to *de novo* review. *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991); *Carson-Truckee Water Conservancy Dist. v. Secretary of the Interior*, 748 F.2d

523, 524 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985). A final determination favoring the plaintiff is not a precondition for a fee award under Section 1988. *Mather v. Gagne*, 448 U.S. 122, 129 (1980). However, the party seeking fees must establish that the party's lawsuit acted as a catalyst which prompted defendants to take action. *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981); *Braafladt v. Bd. of Governors*, 778 F.2d 1442, 1444 (9th Cir. 1985). The moving party has the burden of establishing some sort of clear, *causal relationship* between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983) (quoting *Am. Constitutional Party*, 650 F.2d at 188) (emphasis in original).

In *Sablan v. Department of Finance*, 856 F.2d 1317 (9th Cir. 1988), we established a two-part test:

> First, we must determine what Sablan sought to accomplish in bringing his lawsuit and then determine whether the lawsuit was casually linked to the relief actually obtained. Second, there must be a legal basis for the Sablan's claim - it must not be "frivolous, unreasonable, or groundless."

856 F.2d at 1325 (internal citations omitted). As to the causation prong of the test, we said it was "nothing more than inquiry into factual causation." *Id.*

The Rock Creek attorneys fees claim has two parts: that relating to the activities before FERC, including the subsequent appeals, and that relating to efforts before the district court in this action. We will address the two parts separately.

A. The Administrative Proceedings.

As pointed out above, Rock Creek filed its petition for declaratory order with FERC after it became apparent that the Board was not accepting FERC's authority as exclusive. When

California intervened in that case, the FERC proceeding became the forum in which the battle on the merits was fought.

Rock Creek relies on four United States Supreme Court cases and a Ninth Circuit case in support of its contention that attorneys fees may be awarded under Section 1988 for work before an administrative agency or state court outside the Section 1983 action itself. However, each of those cases is distinguishable.

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), involved a claim for attorneys fees for appearances in state administrative and judicial forums in an action for employment discrimination under Title VII of the Civil Rights Act of 1964. The Court noted the interrelated and complementary nature of the state and federal enforcement efforts. It then said:

> Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

Id. at 65. The FERC proceeding and the Section 1983 action were not interrelated and complementary, in the sense of the Title VII remedies discussed in *New York Gaslight Club*.

North Carolina Department of Transportation v. Crest St. Council, 479 U.S. 6 (1986), held that attorneys fees could not be awarded in an action brought solely to obtain attorneys fees for enforcement activities in other forums. Rock Creek's action in district court had purposes other than obtaining an award of attorneys fees so *Crest* is of no help to us here.

Sullivan v. Hudson, 490 U.S. 877 (1989), involved an award of attorneys fees to a social security claimant under the Equal Access to Justice Act, 28 U.S.C. § 2412, for legal services rendered in administrative proceedings following a remand to the agency from the district court. The court noted that "administrative proceedings may be so intimately connected with judicial proceedings as to be considered part of the 'civil action'

for purposes of a fee award." *Id.* at 892. The administrative proceedings there were required by the remand from the district court, unlike those here.

Rock Creek cites *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), for its holding that attorneys fees could be awarded for administrative proceedings claimed to be "tangential" but which had been "crucial" to the Clean Air Act litigation and which was "as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom." *Id.* at 558. The *Delaware Valley* case involved a complex series of judicial and administrative proceedings, all of which related to an action filed in federal court to compel Pennsylvania to comply with federal law. Even though part of the effort undertaken was in an administrative forum, it was all directly related to the purpose of the suit.

The Ninth Circuit case of *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982), cited by Rock Creek, does not resolve the issue presented, either. After inmates in the Oregon State penal system filed their action under Section 1983, the action was stayed by agreement while the inmates pursued a separate state court action seeking a declaration of state law which could have mooted the federal action. The trip to the Oregon courts resulted in a decision in favor of the state. Because the case was not mooted in state court, it returned to district court where the inmates received some of the relief requested. This court upheld an award of attorneys fees under Section 1988 which included fees for the work in state court. As the court noted, the state court action was filed *after* the federal action was commenced, and at the insistence of the state. The state proceedings, therefore, were an integral part of the overall effort to resolve the inmates' claims, and was pursued solely because of the filing of the federal action. *Id.* at 912.

In *Bartholomew*, the state action was a necessary step before the prevailing party could succeed. Likewise, in *Delaware Valley*, the administrative work was required before the party

could succeed in federal court. Here, however, Rock Creek was not faced with mandatory administrative action before it could prevail.

[2] When Rock Creek became aware of the Board's intransigent attitude about its authority to override the FERC decision, it had at least two choices. One was to attempt to get a definitive response from FERC, in order to buttress a later trip to court. When California intervened on behalf of the Board, and then appealed, this became the vehicle for final resolution on the merits.

[3] The other choice Rock Creek had was to proceed directly to court, and obtain an interpretation of FERC's authority without the benefit of a FERC opinion directly on the issue. While this would have been an appropriate course for Rock Creek to follow, it cannot be faulted tactically for going to FERC first, as it did.

[4] The two avenues open to Rock Creek were independent. Either could have resulted in a decision on the question of FERC's exclusive authority. An approach to FERC was not a condition precedent to its entry to federal court, as in *New York Gaslight Club*. Nor was the FERC decision rendered as a part of a continuing federal court action, as was the case in *Sullivan v. Hudson*. The distinct nature of the two proceedings distinguishes them from the related and dependent proceedings involved in the cases relied on by Rock Creek.

[5] The FERC proceedings resemble more closely the administrative efforts seeking relief for a teacher which were held not to carry a right to attorneys fees for a successful Section 1983 plaintiff:

> Because § 1983 stands as an independent avenue of relief and petitioner could go straight to court to assert it, the School Board proceedings in this case simply do not have the same

> integral function under § 1983 that state administrative proceedings have under Title VII.

Webb v. Dyer County Bd. of Educ., 471 U.S. 234, 241 (1985) (internal punctuation and citations omitted). *Cf., Smith v. Robinson*, 468 U.S. 992, 1011 n. 14 (1984) ("nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit"). The FERC action lacked the "intimate connection" which sustains awards of attorneys fees in administrative or state court proceedings outside the federal action itself. Therefore, Rock Creek's claim for attorneys fees for its efforts before FERC must fail.

B. The Action in Federal Court.

[6] The district court's order denying attorneys fees focused entirely on the lack of causal connection between the FERC decision and the Supreme Court's decision in *California v. FERC*. We agree with that analysis as to the FERC proceedings and subsequent appeals.

[7] However, we believe the district court failed to take into account the other aspects of the Section 1983 action. Rock Creek sought more than a decision on the merits: it also sought a temporary restraining order and preliminary injunction pending a final decision. This was relief not available to it in the FERC proceeding.

In *Texas Teachers v. Garland School District*, 489 U.S. 782 (1989), the Court specifically rejected the "central issue" test for prevailing party status, reiterating the standard set out earlier: plaintiffs may be considered prevailing parties "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Id.* at 789 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The *Texas Teachers* court also noted that:

> A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.

489 U.S. at 791.

In a declaration filed in support of Rock Creek's application for preliminary injunction, counsel for Rock Creek stated that he had called counsel for the Board and stated that if the Board would agree not to commence enforcement proceedings "in a fashion contrary to whatever declaratory relief this court may grant," Rock Creek would withdraw its requests for injunctive relief. "I indicated to Mr. Lee [counsel for the Board] that such an agreement would provide the Partnership with reasonable assurance the relief that it obtains will be effective while avoiding unnecessary injunctive dictates to the State Water Board." He went on to state that in a later conversation with counsel for the Board, he was informed the Board had decided to decline the proposal. The Board did not contradict these statements by Rock Creek's counsel.

The Section 1983 action filed by Rock Creek did not result in a holding that Board had acted in excess of its jurisdiction. That holding came in the administrative proceedings, ultimately affirmed in a decision by the Supreme Court. Therefore, on the merits of Rock Creek's arguments with the Board, this case did not affect or accomplish the result Rock Creek desired. However, Rock Creek also asked for a temporary restraining order and preliminary injunction in its complaint and ultimately pursued both. The FERC proceedings involved a challenge to an order entered by FERC and were not a challenge to the Board's order, which was only collaterally involved. Thus, Rock Creek needed relief in some other forum.

[8] The relief Rock Creek gained in the district court was in effect an informal stay both of the district court proceedings and the Board's threatened enforcement proceedings. The Board had declined Rock Creek's invitation to do by agreement external to

the litigation what later became a condition of the stay, namely, that the Board would not enforce its illegal order.

[9] In this situation, we think the district court focused too narrowly on Rock Creek's failure to obtain relief on the merits in the Section 1983 action. While the district court did not itself enter a stay, it was the pendency of this action in the district court which gave Rock Creek a vehicle by which to obtain a non-enforcement agreement by the Board. The Board did alter its conduct under the pressure of the lawsuit to the extent that Rock Creek did not need to obtain a formal preliminary injunction. It is possible that the Section 1983 action was causally related to the practical outcome realized and the non-enforcement of the illegal order.

Therefore, based on the foregoing analysis, we believe the district court erred in denying attorneys fees to Rock Creek on the basis asserted and the judgment should be vacated and the case remanded for the purpose of reconsideration of Rock Creek's motion for attorneys fees for its efforts in the Section 1983 action only.[1] The attorneys fees decision is committed to the district court's discretion and we express no opinion as to the ultimate outcome. Rock Creek's request for attorneys fees for pursuing this appeal is referred to the district court. If the district court, awards fees for Rock Creek's efforts in the district court, it shall fix and award fees to Rock Creek for this appeal.

VACATED AND REMANDED. Costs to appellant.

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[1] Since the district court decided the motion for fees on a causation analysis, it did not have occasion to reach the other prong of the *Sablan* test: Whether there was a legal basis for Rock Creek's case, *i.e.*, "it must not be frivolous, unreasonable, or groundless." *Sablan*, 856 F.2d at 1325. That issue is still open on remand.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROCK CREEK LIMITED PARTNERSHIP, a California limited partnership,	)	CASE NO. S-87-0523-LKK
Plaintiff,	)	ORDER DENYING THE PLAINTIFF'S MOTION ATTORNEYS' FEES
STATE WATER RESOURCES CONTROL BOARD, etc., et al.,	)	Date: Jan. 22, 1991 Time: 10:00 a.m.
Defendants.	)	Place: The Honorable Lawrence K. Karlton

On January 22, 1991 this Court heard plaintiff's motion for attorneys' fees. Appearing as counsel for the State defendants State Water Resources Control Board and the individual State defendants were Deputy Attorney General Clifford T. Lee and State Water Resources Control Board staff counsel Barbara Leidigh. Appearing as counsel for plaintiff Rock Creek Limited Partnership was Louis Touton. Upon conclusion of oral argument, the Court announced that it was denying the plaintiff's motion and set forth the reasons for its denial for the record. The Court further ordered the State defendants to prepare a formal order consistent with the record. After full consideration of moving and responding papers, all supporting papers and exhibits, and oral argument, the Court denies the plaintiff's motion for attorneys fees for the following reasons:

1. Under 42 U.S.C. Section 1988, this Court may only award attorney's fees to the "prevailing party." 42 U.S.C., § 1988 (Supp. 1990).

2. A party can demonstrate prevailing party status by establishing a "clear causal relationship between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983).

3. Whether a clear causal relationship exists involves two inquiries:

a) The Court must determine what the plaintiff sought to accomplish in bringing the lawsuit and then must determine whether the lawsuit was causally linked to the relief actually sought; and

b) There must be a legal basis for the plaintiff's claim. *Sablan v. Dept. of Finance of North Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988).

4. Although the plaintiff has received the relief it sought in this case, there is no causal link between this litigation and the relief. The plaintiff's goal when commencing this action was the removal of the threat posed to its federal rights by the California State Water Resources Control Board's order. This goal was achieved when the Board withdrew its order pursuant to the Supreme Court's ruling in *California v. FERC*, ____ U.S. ____, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990). This Court finds that the litigation in this Court has no causal relationship to the court's decision in *California v. FERC*, or the invalidation of the Board's order.

5. Because no causal relationship exists between this district court action and the invalidation of the Board's order, plaintiff Rock Creek Limited Partnership is not a prevailing party within the meaning of 42 U.S.C. Section 1988 for the purposes of this action. 42 U.S.C., § 1988 (Supp. 1990)

In light of the above reasons, the plaintiff's motion for attorney's fees is DENIED.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON, CHIEF
JUDGE EMERITUS
UNITED STATES DISTRICT COURT

ORDER DENYING THE PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES

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No. 92-785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,
Petitioner,

VS.

STATE WATER RESOURCES CONTROL BOARD, et al.,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether attorneys' fees are available under 42 U.S.C., § 1988 for administrative and other proceedings that are fully independent of an action brought under 42 U.S.C., § 1983.

2. Whether attorneys' fees are available under 42 U.S.C., § 1988 for administrative and other proceedings where the moving party has not established that the action brought under 42 U.S.C., § 1983 has materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the moving party.

PARTIES

The petitioner is the Rock Creek Limited Partnership.

The respondents are the State Water Resources Control Board, Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh and Eliseo V. Samaniego.

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No. 92-785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,
Petitioner,

VS.

STATE WATER RESOURCES CONTROL BOARD, et al.,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 972 F.2d 274. The opinion of the United States District Court for the Eastern District of California is unreported.

STATEMENT

In this case, the petitioner sought relief from the terms and conditions contained in the water right permits issued by the State Water Resources Control Board ("State Board") for the petitioner's hydroelectric power project under two strategies. First, the petitioner filed an administrative petition for declaratory relief with the Federal Energy Regulatory Commission ("FERC"). Second, eight months later, the petitioner filed an action in U. S.

District Court under Section 1983 of the Civil Rights Act seeking relief against the respondent. The district court stayed its proceedings pending the resolution of the administrative action before FERC. Appeals from the FERC proceeding resulted in this Court's decision in *California v. FERC*, 495 U.S. 490 (1990), a decision that confirmed Federal Power Act preemption over conflicting state water right requirements. At issue in this case is whether the petitioner is entitled to attorneys' fees under Section 1988 of the Civil Rights Act for the FERC proceedings and the subsequent appeals, even though such proceedings were fully independent from the district court action.

1. The FERC Proceedings

On April 29, 1983, FERC issued a license for the Rock Creek Project, a hydroelectric facility located in El Dorado County, California, under the Federal Power Act. (Supplemental Excerpts of Record filed with the Ninth Circuit ("SEOR") at 7.) On June 12, 1984, the State Board issued state water right permits for the project. These permits set interim, fishery bypass flow levels identical to those contained in the FERC license. (SEOR at 8.)

On July 9, 1986, eight months prior to the filing of the district court action that is the subject of this petition, the petitioner filed an administrative complaint for declaratory relief with FERC. The complaint argued that the FERC's "jurisdiction over the license and the operation of the project under the license is exclusive and preempts state authority." (SEOR at 22.) On February 13, 1987, the petitioner filed an emergency request with FERC urging the agency to expedite the original petition. (SEOR at 30.) On March 11, 1987, FERC responded by issuing a declaratory order holding that FERC had the exclusive jurisdiction to set fishery bypass flows for the petitioner's project. (SEOR at 37-38.)[1]

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[1] At no time prior to the issuance of this order did the petitioner serve the State Board with any of its pleadings or did FERC inform the State Board that the jurisdictional question was pending before FERC. (EOR, Tab. 39 at 2.)

On March 16, 1987, the State Board received by mail a copy of FERC's March 11, 1987 order. (Excerpts of Record filed with the Ninth Circuit ("EOR"), Tab 39 at 2.) On March 19, 1987, the State Board amended the petitioner's water right permits to increase the fishery bypass flows above the level established in the FERC license. (SEOR at 42-91.) On April 9, 1987, the State Board filed and served a motion to intervene in the FERC proceeding and a request for rehearing. (SEOR at 12.)

On November 20, 1987, FERC issued an order denying the state's request and affirming FERC's exclusive jurisdiction in setting fishery bypass flows for the petitioner's project. (SEOR at 127.) On December 21, 1987, the State Board filed a petition for review of the contested FERC orders with the 9th Circuit Court of Appeals. (SEOR at 135.)

On June 6, 1989, the 9th Circuit Court of Appeals affirmed the FERC orders. *State of California, et al. v. FERC*, 877 F.2d 743 (9th Cir. 1989). On December 4, 1989, this Court granted the State of California's petition for a writ of certiorari and on May 21, 1990 the Court issued a decision affirming the FERC orders and the preemptive authority of the Federal Power Act over the state's fishery requirements. *California v. FERC*, 495 U.S. 490 (1990). On July 19, 1990, the State Board responded to this Court's decision by amending the fishery requirements in the petitioner's water right permits to conform with the decision. (SEOR at 151.)

2. The District Court Proceedings

On April 9, 1987, the petitioner filed and served its complaint for injunctive and declaratory relief in the district court. Like its administrative complaint that it filed with FERC eight months earlier, the district court complaint specifically contested the new, State Board fishery requirements. (SEOR at 124-125.) However, the complaint also raised claims under Section 1983 of the Civil Rights Act. On May 18, 1987, the district court heard the petitioner's motion for preliminary injunction against the state. Upon completion of oral argument, the district court denied the motion for preliminary injunction. (Reporter's Transcript filed with Ninth Circuit ("RT") at 21.) On September 18, 1987, the

district court heard the parties' cross-motions for summary judgment. (RT at 23.) The district court then took the motions under submission. (RT at 58.)

On January 4, 1988, the State Board disclosed to the district court the concurrent developments in the FERC proceedings by way of a written status report. On April 5, 1988, the district court conducted a status conference to determine the appropriate status of the action in light of the State Board's 9th Circuit appeal from the contested FERC orders. (SEOR at 146.) At the status conference, the district court requested the State Board to consider waiving for the duration of the appeal any possible enforcement action against the petitioner for noncompliance with the state's higher level of fishery protection.

In an April 14, 1988 letter to the district court, the State Board agreed to waive enforcement action in order to ensure "more rapid appellate resolution of the federal-state relationship issue." (SEOR at 143.) However, the State Board agreed to this waiver only "for the duration of the appeal in the *State of California v. Federal Energy Regulatory Commission* . . . action." *Id.* Moreover, the Board's letter limited the waiver with the following conditions:

> "2. The State Board agrees to the waiver of enforcement authority as described in paragraph 1 solely for the purpose of obtaining a stay of the trial court proceedings in this action and, thus, encouraging the prompt resolution of the *State of California v. Federal Energy Regulatory Commission*, 9th Circuit action. This waiver of enforcement authority should not be considered as precedent with respect to the State Board's general enforcement policy over other water right permits. Morever, the waiver should not be considered as precedent with respect to the State Board's general enforcement policy over other water right permits. Moreover, the waiver should not be considered as an admission by the State Board that the bypass flows set forth in Order No. 87-2 are not necessary or otherwise required for the protection of the fishery resources of Rock Creek." *Id.* at pp. 143-144.

In an April 25, 1988 order, the district court affirmed the State Board's temporary waiver of its enforcement powers. The district court then vacated its submission of the cross-motions for summary judgment, stayed all proceedings pending resolution of the state's appeal in *California v. FERC*, and requested the State Board to inform the Court when the appeal became final. (SEOR at 146-147.) The order staying proceedings was subsequently extended to include final action on the State Board's appeal to this Court.

As previously noted, on July 19, 1990 the State Board responded to this Court's 1990 decision in *California v. FERC* by amending the petitioner's water right permits to conform to the decision. On September 14, 1990, the district court dismissed the petitioner's action, including its Section 1983 claim, and entered judgment in favor of the State Board on the grounds of mootness. (EOR, Tabs 68 and 69.) On March 5, 1991, after notice and hearing, the district court denied the petitioner's attorneys' fees motion. (EOR, Tab 80.) The trial court concluded that "[b]ecause no causal relationship exists between this district court action and the invalidation of the Board's order, plaintiff Rock Creek Limited Partnership is not a prevailing party within the meaning of 42 U.S.C. Section 1988 for the purposes of this action." (EOR, Tab 80 at 3.)

On appeal, the 9th Circuit Court of Appeals concluded that the proceedings before FERC and the subsequent appeals were sufficiently unrelated and independent from the district court action to bar the award of fees for these proceedings under Section 1988 of the Civil Rights Act. *Rock Creek Limited Partnership v. State Water Resources Control Board*, 972 F.2d 274, 279 (9th Cir. 1992). The circuit court, however, also concluded that the petitioner had obtained a temporary stay of proceedings before the district court and that this result justified a remand to the trial court for a determination of whether fees should be awarded for the petitioner's activity before the district court. *Id.* at 280. It is from the circuit court's decision to deny fees for the FERC proceedings and the subsequent appeals that the petitioner has filed the pending petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I

THIS COURT'S DECISIONS HAVE ALREADY RESOLVED THE ISSUE RAISED BY THE PETITIONER.

According to the 9th Circuit Court of Appeals, the petitioner's FERC proceeding and the petitioner's district court proceeding were "independent" avenues, either of which "could have resulted in a decision on the question of FERC's exclusive authority". *Rock Creek Limited Partnership v. State Water Resources Control Board*, 972 F.2d 274, 279 (9th Cir. 1992). The FERC proceeding was not a condition precedent to the filing of the district court action, nor was the proceeding an element of the district court's continuing authority on remand. *Id.* The petitioner in this case does not contest the circuit court's characterization of the petitioner's litigation strategy. In at least five decisions, this Court has held that statutory attorneys' fees are unavailable for administrative or other proceedings that are fully independent of the underlying district court action.

In *New York Gaslight Club, Inc. v. Carey*, this Court considered whether work done before state administrative or judicial proceedings could justify a fee award in a federal employment discrimination action under Section 706(k) of the Civil Rights Act of 1964. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). In *Carey*, this Court concluded that a fee award was appropriate because the federal statute required the "exhaustion of state or local remedies". *Id.* at 64. According to the court, "only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme." *Id.* at 65. The *Carey* decision therefore authorized fee awards only where the alternate administrative proceedings were "mandated" by federal statute. *Id.*

In *Webb v. Dyer County Board of Education*, this Court expressly affirmed the view that attorneys' fees under Section 1988 of the Civil Rights Act were not available for work involving independent administrative proceedings. *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985). At issue in *Webb* was whether fees were available for work involving the school board

proceedings that preceded the filing of a Section 1983 claim. *Id.* at 239-240. In response, this Court expressly rejected an extension of *Carey* to include independent proceedings and held that:

> "Because § 1983 stands "as an independent avenue of relief" and petitioner "could go straight to court to assert it," ibid., the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.
>
> Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§ 1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory." *Id.* at 241.

The *Webb* decision therefore unequivocally rejected the petitioner's contention that fees are available under Section 1988 for work involving independent proceedings, such as the petitioner's FERC proceedings and the subsequent appeals.

The petitioner has attempted to buttress its fee argument by referencing three subsequent decisions of this Court. However all of these decisions affirm the holding in *Webb*. In *Pennsylvania v. Delaware Valley Citizens' Council*, this Court affirmed a fee award for work before state and federal administrative agencies because, "consistent with our opinion in *Webb*", the work was in furtherance of the district court's consent decree and was "of a type ordinarily necessary to secure the final results obtained from the litigation." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 561 (1986). In *North Carolina Department of Transportation v. Crest Street Community Council*, this Court again affirmed the *Webb* decision and limited fee awards to administrative proceedings "both useful and of a type ordinarily necessary to advance the civil rights litigation." *North Carolina Department of Transportation v. Crest Street Community Council*, 479 U.S. 6, 15 (1986).

Finally, in *Sullivan v. Hudson*, this Court again found that attorneys' fees were only appropriate as to work directly related to the judicial action in which fees have been sought. *Sullivan v. Hudson*, 490 U.S. 877, 888-889 (1989). According to the Court in *Sullivan*:

> "Our past decisions interpreting other feeshifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." *Id.* at 888.

In approving the fee award, the Court observed that the administrative proceedings were "mandatory" and were crucial to the "vindication of [respondent's] rights." *Id.* at 889.

The petitioner's effort to obtain attorneys' fees for their work involving the FERC proceedings is therefore fully inconsistent with all available case authority from this Court. The circuit court in this case found that the FERC proceedings were fully independent from the district court action. As this Court established in *Webb*, independent administrative proceedings that are not linked to the federal court action cannot provide grounds for fee generation.

II

THE PETITIONER'S FEE CLAIM IS NOT SUSTAINABLE BECAUSE THE PETITIONER CANNOT ESTABLISH THAT ITS DISTRICT COURT ACTION RESULTED IN ANY MATERIAL ALTERATION OF THE LEGAL RELATIONSHIP BETWEEN THE PARTIES.

In *Hewitt v. Helms* this Court recognized that a "prevailing" party within the meaning of Section 1988 of the Civil Rights Act must establish that his or her civil rights action resulted in a material alteration of the other party's conduct to the prevailing party's benefit. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). In *Hewitt*, a prisoner objected to a form of restrictive custody on due

process grounds. *Id.* at 757-758. In the course of the litigation, the prisoner received a positive declaratory ruling from the court of appeals on one aspect of his due process claim, the claim challenging the use of unidentified informants in misconduct proceedings. *Id.* at 758. While the case was pending, the prisoner was released on parole and, eventually, the prison officials altered their disciplinary procedures regarding the use of unidentified informants. *Id.* at 759. Despite this judicial victory, this Court denied the prisoner's attorneys fee claim. As this Court explained:

> "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has "prevailed" in his suit, because he has obtained the substance of what he sought. Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id.* 761.

Thus, this Court has confirmed the view of the 9th Circuit Court of Appeals that a successful Section 1988 claim for fees must establish that the "lawsuit was causally linked to the relief actually obtained." *Sablan v. Department of Finance*, 856 F.2d 1317, 1325 (9th Cir. 1988).

In the Court's recent decision in *Farrar v. Hobby*, the Court has further amplified on this causation requirement:

> "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought. *Hewitt, supra*, at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt, supra*, at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Rhodes, 488 U.S., at 4. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the

> plaintiff into a prevailing party. *Garland, supra*, at 792-793. *In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby*, ____ U.S. ____, 61 U.S.L.W. 4033, 4035-4036 (1992) (Emphasis added).

In the present case, the petitioner has not received *any* benefits from its district court action, aside from a temporary stay of proceedings, nor did the petitioner's Section 1983 claim result in the "material alteration of the legal relationship of the parties." As the circuit court in this case established, the petitioner obtained its legal relief under the Federal Power Act through the FERC proceedings, proceedings that were fully independent of the district court action. The petitioner therefore cannot be considered a prevailing party under Section 1988 for purposes of its district court claims.

CONCLUSION

For the above reasons the respondent State Board respectfully requests this Court to deny the petition for a writ of certiorari in this case.

Dated: December 29, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' Brief in Opposition ("Opposition" or "Opp.") confirms that a grant of certiorari in this case is both appropriate and necessary to resolve a continuing conflict among the Circuits:

1. The Opposition does not dispute that a widespread conflict exists among the Circuits with respect to the interpretation of this Court's decisions concerning the right to statutory attorneys' fees for work performed in related administrative and state proceedings. As we have pointed out (Pet. 15-20), the First, Third and Seventh Circuits have approved awards where resort to the collateral proceeding was nonmandatory, while the decision below, like those of the Second, Fifth and Tenth Circuits, has held that such awards are unavailable unless the collateral

proceedings were required by statute or court order. Neither the existence, nor the significance, of that conflict is disputed by Respondents.

2. In opposing certiorari, Respondents place their primary reliance on this Court's decision in *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985), which Respondents suggest "unequivocally rejected the petitioner's contention. . . ." (Opp. 7). *Webb* did no such thing.

In *Webb*, this Court held that "[a]dministrative proceedings established to enforce tenure rights created by *state* law simply are not part of any proceedings to enforce § 1983." 471 U.S. at 241 (emphasis added). By contrast, in the present case, Petitioner sought to vindicate the same *federal* right before the Federal Energy Commission ("FERC") and in the district court Section 1983 action. As evident from our discussion in the Petition (Pet. 11-15), decisions of this Court before and after *Webb* make clear that recovery is appropriate for nonmandatory administrative proceedings that seek to vindicate *federal* rights or policies.

Thus, in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980), fees were found awardable for largely nonmandatory litigation in state and administrative fora where plaintiffs succeeded in vindicating "federal [Title VII] policies" at the "state or local level." Likewise, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), the Court awarded fees under the Clean Air Act for the fee claimant's efforts to protect, through entirely nonmandatory participation in collateral state and administrative proceedings, the scope of a federal consent decree entered to enforce the Act. *See also North Carolina Dep't of Transportation v. Crest Street Community Council*, 479 U.S. 6, 15 (1986)("[a] court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation.")

3. But, whether we or the Respondents are correct in interpreting this Court's decisions, the undisputed fact remains that the lower federal courts are in hopeless conflict concerning the interpretation of those decisions, and the issue arises with considerable frequency. *See* Pet. at 15-21.

4. Respondents also do not dispute that the rule adopted by the Ninth Circuit undermines other important prudential policies developed by this Court to encourage resort to federal administrative agencies for determination of issues of statutory interpretation. Under the theory articulated by the Ninth Circuit, Petitioner had "at least two choices": it could "proceed directly to court, and obtain an interpretation of FERC's authority without the benefit of a FERC opinion directly on the issue" -- thus securing attorneys' fees -- or it could "attempt to get a definitive response from FERC, in order to buttress a later trip to court" -- in the process foregoing such fees. (Pet. App. 9a).

If the Ninth Circuit's decision were allowed to stand, the lesson would not be lost on future litigants. In order to secure attorneys' fees, they will seek to litigate their claims exclusively before the federal court in the civil rights action, thus depriving the federal courts of the agency's view of the interpretation of the federal statute -- an interpretation this Court has repeatedly valued under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Avoiding the agency could thus undercut obvious federal interests in achieving uniform, competent interpretation and administration of federal regulatory schemes.

5. Finally, in Part II of the Opposition, Respondents suggest that certiorari should not be granted because the FERC proceeding, rather than the district court proceeding, "caused" the state to withdraw its order. Respondents seriously misunderstand the governing principle, and none of the cases they cite remotely

supports their argument.[1] Where administrative proceedings and the federal court action seek the same relief, it is immaterial that the relief may have been awarded in the administrative or collateral proceeding rather than in federal court. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (fees awarded under Title VII fee shifting provision for state and federal administrative proceeding, although the judgment on the merits was obtained in state court); *Sullivan v. Hudson*, 490 U.S. 877 (1989) (fees awarded to social security disability claimant, where disability benefits were awarded by the Social Security Administration in an administrative remand from federal court).

6. The frequency with which the issues presented here arise and the number of conflicting Court of Appeals decisions are not contested by Respondents; resolution of the issue by this Court is important to both government and individual litigants.

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[1] Respondents rely on *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Farrar v. Hobby*, 61 U.S.L.W. 4033 (U.S. Dec. 15, 1992). In *Hewitt*, the Court merely held that an "interlocutory ruling that [the fee claimant's] complaint should not have been dismissed for failure to state a constitutional claim" did not satisfy Section 1988's "prevailing party" requirement. 482 U.S. at 760. In *Farrar*, the fee claimant had recovered only nominal damages upon conclusion of the civil rights litigation. The Court held that, although the claimant satisfied the "prevailing party" requirement, Section 1988's provision for "reasonable" fee awards did not support any award at all where the degree of success achieved was so minimal. Neither *Hewitt* nor *Farrar* involved, or even mentioned, the availability of fee awards for administrative or other proceedings collateral to civil rights litigation.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

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OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP, PETITIONER

v.

STATE WATER RESOURCES CONTROL BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 42 U.S.C. 1988 authorizes the recovery of attorney's fees incurred in administrative proceedings that are not a part of the process of enforcement of a civil rights statute and do not contribute to any relief obtained in the district court action.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States in this case.

STATEMENT

1. Petitioner operates a hydroelectric facility on Rock Creek in California. In April 1983, the Federal Energy Regulatory Commission (FERC) issued a license requiring petitioner to allow certain minimum amounts of water to flow past the project (ranging from 11 cubic feet per second during the summer to 15 cubic feet per second during the winter). In February 1984, the respondent California State Water Resources Control Board issued a permit for the project with interim flows duplicating

those required by FERC. When the Board held hearings in 1986 to consider whether it should impose higher minimum flows than those required by the FERC license, petitioner sought an order from FERC declaring that FERC had the exclusive authority to impose flow requirements on the project. In March 1987, FERC issued such an order, stating that the Board has no authority to set minimum flows for the project greater than those required by the license FERC had issued. A few days later, the Board issued an order setting minimum flow conditions ranging from 30 cubic feet per second to 60 cubic feet per second, much higher than those established in the FERC license. See Pet. App. 2a-3a; Pet. 3.

At that point, the State of California intervened in the FERC proceedings on behalf of the Board, challenging FERC's authority to issue the declaratory order. See Pet. App. 3a. After further proceedings, FERC rejected California's position. In 1989, the Ninth Circuit affirmed FERC's order in *California* v. *FERC*, 877 F.2d 743, 750. This Court granted California's petition for a writ of certiorari and subsequently affirmed unanimously. See *California* v. *FERC*, 495 U.S. 490 (1990).

2. Petitioner also attempted to litigate its dispute with the Board in the United States District Court for the Eastern District of California. When the Board responded to FERC's first order by issuing its order setting minimum flow conditions inconsistent with those established by FERC, petitioner filed this action under 42 U.S.C. 1983. The complaint sought a temporary restraining order and a preliminary injunction against enforcement of the order, as well

as attorney's fees pursuant to 42 U.S.C. 1988. See Pet. App. 3a.

When the Board voluntarily agreed to refrain from enforcing its order pending a hearing on the preliminary injunction, petitioner withdrew its request for a temporary restraining order. Similarly, when the Board subsequently agreed to refrain from enforcing its order until the completion of the proceedings in *California* v. *FERC*, *supra*, the district court stayed the Section 1983 case pending resolution of those proceedings. After this Court ruled in favor of FERC, the Board granted permits conforming to the flow levels approved by FERC. The district court then granted the Board's motion to dismiss the Section 1983 action, retaining jurisdiction only to consider petitioner's motion for attorney's fees. See Pet. App. 3a-5a.

After briefing and a hearing, the district court court noted that 42 U.S.C. 1988 authorizes an award of fees only to a "prevailing party" and reasoned that petitioner was not a prevailing party because there was "no causal link" between the Section 1983 litigation and the relief petitioner obtained in the *California* v. *FERC* case. Pet. App. 14a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-12a. With respect to the request for fees incurred in the Section 1983 case, the court held that petitioner could be regarded as a prevailing party, because pressure from that lawsuit caused the Board to alter its conduct sufficiently to obviate petitioner's need for a preliminary injunction. Accordingly, the court of appeals remanded the case to the district court for further consideration of petitioner's motion for attorney's

fees related to the Section 1983 proceeding. Pet. 10a-12a.

With respect to the claim for fees incurred in the FERC proceeding, however, the court affirmed. Pet. App. 6a-10a. The court agreed with the district court that petitioner was not entitled to attorney's fees for costs incurred in the FERC proceeding, and the subsequent appeals of that proceeding to the Ninth Circuit and this Court, because the relief available from FERC was "independent" from the relief available under Section 1983 in the district court. *Id.* at 9a. The court explained that petitioner's "approach to FERC was [neither] a condition precedent to its entry to federal court * * * [nor] part of a continuing federal court action." *Ibid.* Thus, the court agreed with the district court that fees could not be awarded for the FERC proceeding because of "the lack of causal connection" between the Section 1983 case and the relief obtained from FERC and the Supreme Court. *Id.* at 10a.

DISCUSSION

1. Under 42 U.S.C. 1988, district courts have discretion, in "any action or proceeding to enforce [certain listed provisions of Title 42]," to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." To obtain the fees sought here, petitioner must establish that the fees it seeks were incurred in an "action or proceeding to enforce" 42 U.S.C. 1983 (the listed provision of Title 42 on which petitioner relied in this case).[1]

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[1] As respondent points out (Br. in Opp. 8-10), it is questionable whether petitioner—who did not obtain any relief

a. Because the proceedings before FERC (including the subsequent judicial review of those proceedings) did not constitute an action to enforce Section 1983, fees incurred in those proceedings are directly compensable only if those proceedings were so closely related to the Section 1983 action that they may be

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from the district court—satisfied the threshold requirement that it be a "prevailing party." Of course, it is possible in some cases to be a prevailing party without obtaining any relief from the court. See *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987). To secure such a ruling, however, the plaintiff must show that the civil rights lawsuit caused the defendant to take the action sought by the plaintiff; the plaintiff is not a prevailing party if the defendant takes the action for reasons independent of the lawsuit. See *id.* at 760 (lawsuit must "produc[e]" the relief); *id.* at 761 (plaintiff prevails only if "the defendant, under pressure of the lawsuit, alters his conduct"); see also *id.* at 763 (plaintiff's contention that the lawsuit "prompted" the defendant to change its conduct). In this case, both of the lower courts found that this lawsuit did not cause the relief petitioner obtained in the FERC proceedings. Pet. App. 10a, 14a.

The court of appeals did find, however, that the civil rights lawsuit caused respondents to alter their conduct temporarily, obviating the need for petitioner to secure a temporary restraining order or preliminary injunction. In the circumstances of this case, we doubt that respondent's temporary forbearance constitutes sufficient success "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983), and thus is not sufficient to render petitioner a prevailing party. Resolution of that question, however, is not necessary to the decision of the case, because, as we discuss below, the fees petitioner seeks in connection with the FERC proceeding were not incurred in a "proceeding to enforce [Section 1983]" and thus would not be compensable even if petitioner were considered a "prevailing party" in the Section 1983 action.

considered part of that action. This Court's decisions make such a conclusion untenable on the facts of this case.

In *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), this Court considered for the first time the propriety under a fee-shifting statute of awarding compensation in a district court action for fees incurred in related administrative proceedings. In that case, the Court held that fees were available in an action under Title VII of the Civil Rights Act of 1964 for costs incurred in the portion of the proceedings that took place before a state administrative agency.[2] 447 U.S. at 60-71. The Court relied heavily on the structure of Title VII, under which claimants are required to present their claims to state administrative agencies; the court reasoned that denial of fees "would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim." 447 U.S. at 63; see also *id.* at 65 ("Initial resort to state and local remedies is mandated.").

The Court's subsequent decision in *Webb* v. *County Board of Education*, 471 U.S. 234 (1985), made

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[2] *Carey* involved Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), but the Court subsequently has suggested that its analysis of that provision was applicable to Section 1988 as well. See, *e.g.*, *Webb* v. *County Board of Education*, 471 U.S. 234, 240 (1985); *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6, 15 (1986). Even though the fee-shifting provision in Section 706 of Title VII resembles Section 1988, the differences between the underlying Title VII action and actions under 42 U.S.C. 1983 make the availability of fees in the two situations quite different, as this Court's decision in *Webb* makes clear.

clear that *Carey* did not establish a broad rule requiring fee awards for all types of administrative proceedings. The plaintiff in *Webb* contended that his employment as a school teacher had been terminated for racial reasons. After unsuccessfully challenging his termination before the responsible state agency, Webb filed suit in district court seeking relief under various civil rights statutes. When he obtained relief in the district court, he relied on *Carey* to support his claim for compensation under 42 U.S.C. 1988 for the attorney's fees incurred in the state administrative proceedings. The Court rejected that claim, explaining that

> *Carey* * * * arose under a statute that expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum. There is no comparable requirement in § 1983, and therefore the reasoning in *Carey* is not applicable to this case. * * * Because § 1983 stands "as an independent avenue of relief" and petitioner "could go straight to court to assert it," the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.

471 U.S. at 240-241 (footnote and citation omitted) (quoting *Smith* v. *Robinson*, 468 U.S. 992, 1011 n.14 (1984)); see *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6, 15 (1986) (explaining *Carey* as authorizing fees "for time spent on administrative proceedings to enforce the civil rights claim"). Because the administrative proceedings at issue here were not proceedings "to enforce" petitioner's civil rights claim, petitioner was not entitled to compensation for the fees petitioner incurred in those proceedings.

b. To be sure, there are some circumstances in which administrative proceedings that are not themselves proceedings "to enforce" a civil rights claim will produce results that are of sufficient use in the district court action to justify including compensation for those fees as part of the reasonable fees for the district court action. As the Court explained in *Webb*, a court may award fees for "any discrete portion of the work product from the administrative proceedings * * * that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." 471 U.S. at 243; see *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986) (same); *Crest Street*, 479 U.S. at 15 (same); *Sullivan* v. *Hudson*, 490 U.S. 877, 889 (1989) (same). That rule reflects the fact that the reasonable attorney's fee allowed under Section 1988 compensates not only for time spent in court, but also for time spent in preparing applicable pleadings, investigating the background of the case, and similar matters that contribute significantly to whatever success the plaintiff obtains in the district court action. It would be anomalous to compensate such costs generally, but to bar compensation if the costs are incurred in the first instance in some other proceeding.

Under that principle, petitioner is not entitled to compensation for the FERC proceedings, because those proceedings were not a necessary or useful predicate to relief in the Section 1983 action. To use this Court's language, none of the work done in the administrative proceeding was "useful * * * to advance the civil rights litigation to the stage it

reached before settlement," *Webb*, 471 U.S. at 243; indeed, the civil rights litigation never advanced to a stage where the work done in the administrative proceedings was useful in the district court action in any way. Compare *Delaware Valley*, 478 U.S. at 558-561 (appropriate to compensate for costs incurred in administrative proceedings designed to protect the efficacy of relief that was obtained from the district court); *Hudson*, 490 U.S. at 888-892 (appropriate to compensate for costs incurred in administrative proceedings "necessary to the completion of a civil action" in which the claimant secured relief).

Petitioner's claim is substantially broader than the claims made in any of this Court's attorney's fee cases. Petitioner's claim is not that the FERC proceedings aided it in obtaining or protecting some type of relief in the district court; petitioner obtained *no* relief from the district court. Rather, petitioner seeks fees for all reasonable costs incurred in the FERC proceedings because petitioner obtained *in those proceedings* the relief that it might have obtained in the Section 1983 case if it had pursued the Section 1983 case as the vehicle for seeking a ruling on FERC's exclusive authority to impose flow requirements. Neither this Court's cases nor the language of Section 1988 supports that claim.

2. Petitioner also argues (Pet. 15-20) that plenary review is appropriate to resolve a conflict between the decision in this case and decisions of the First, Third, and Seventh Circuits. We do not agree; the decisions on which petitioner relies do not establish a conflict warranting review by this Court. In the first place, all four of the opinions on which petitioner relies were decided before this Court's decision in *Webb*, which clarified the relevant principles.

In any event, none of the decisions suggests that any court would have decided this case any differently even before *Webb*.

a. Two of the decisions on which petitioner relies (Pet. 17-18) involved situations that resemble *Carey*, in which it was necessary for the claimants to participate in the other proceedings in order to protect their right to relief in the district court action. *See Lampher* v. *Zagel*, 755 F.2d 99, 102-104 (7th Cir. 1985) (appropriate to award fees incurred in state court proceeding that determined legal question at issue in federal case, where federal district court abstained pending resolution of the state court proceeding); *Stathos* v. *Bowden*, 728 F.2d 15, 22 (1st Cir. 1984) (appropriate to award fees incurred in state court proceeding filed by defendants in federal action "in order to preempt the federal action," where federal court determined that "plaintiffs were forced to defend [the state court action] lest they lose their § 1983 claim in the federal courts through collateral estoppel"). Although it is not clear that *Carey* required an award of fees in those cases—the state court proceedings were not "proceedings to enforce" Section 1983—the Ninth Circuit's discussion in this case (Pet. App. 8a-9a) of its earlier decision in *Bartholomew* v. *Watson*, 665 F.2d 910 F.2d (1982), on which both of those courts relied (see *Lampher*, 755 F.2d at 103-104; *Stathos*, 728 F.2d at 22), suggests that there is no reason to believe that those courts would have been any more likely to grant relief in this case than the Ninth Circuit.

b. The third case, like this Court's decision in *Delaware Valley*, involved an award of fees for work performed in administrative proceedings that

materially contributed to the plaintiff's success in securing effective relief from the district court. See *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760, 766-767 (7th Cir. 1982) (appropriate to award fees incurred in plaintiffs' attempt to have defendant debarred from government contracts where defendant agreed to settlement in Title VII action to forestall possible debarment), cert. denied, 461 U.S. 956 (1983). That case is clearly distinguishable from this case, where the administrative proceeding played no role in the obtaining of relief in the district court action.

c. The fourth case on which petitioner relies (Pet. 18), *Sullivan* v. *Pennsylvania Department of Labor and Industry*, 663 F.2d 443 (3d Cir. 1981), cert. denied, 455 U.S. 1020 (1982), is similarly unhelpful to petitioner. In that case, the court awarded fees to a plaintiff who secured relief in an arbitration that she had sought in a Title VII lawsuit arising out of the same incident. 663 F.2d at 451-452. The issue in the case, however, was whether the plaintiff was a prevailing party for purposes of the fee-shifting provision in Title VII even though she obtained no relief in the Title VII litigation. The court concluded that she should be treated as a prevailing party in the Title VII litigation because that litigation was a substantial cause of her success in obtaining the relief she sought in her Title VII complaint, even though she obtained that relief through an arbitration award rather than in the Title VII proceeding itself. See *id.* at 450 ("the crucial question * * * is not whether a plaintiff *actually* prevailed in a * * * civil rights lawsuit, but whether the plaintiff may be deemed to have prevailed in the civil rights action because of the causal connection between the suit

filed and the relief obtained"); see also *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987). Both of the lower courts in this case found that petitioner could not prevail under such a theory here, because there was no causal connection between the filing of the Section 1983 action and the relief petitioner obtained in the FERC proceeding. Pet. App. 10a, 14a.

In any event, *Pennsylvania Department of Labor* does not support petitioner's argument in this case. Although the claimant in that case obtained complete relief through arbitration, the work for which fees were sought was limited to the "work done in connection with the EEOC proceedings and the Title VII litigation in federal court, not [the] work done in connection with the arbitration itself." 663 F.2d at 447. Accordingly, that decision—which, given the view that the plaintiff was a prevailing party, follows directly from *Carey*—does not benefit petitioner, which seeks compensation not for the fees incurred in the Section 1983 action, but for the fees incurred in the FERC proceedings.

d. Finally, petitioner contends (Pet. 19) that a "hopeless conflict" has arisen among Eighth Circuit rulings on the compensability of fees incurred in administrative proceedings. An intracircuit conflict, of course, is not a sufficient basis for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, petitioner's contention is overstated. Each of the three Eighth Circuit decisions petitioner cites as having awarded fees relied on the standard articulated in *Webb* to justify a fee award for administrative proceedings that contributed substantially to relief that the plaintiffs ob-

tained from the district court.[3] Because there was no causal connection in this case between the administrative proceedings and any relief obtained from the district court, the reasoning of those decisions would not support an award of the fees petitioner seeks in this case.

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[3] See *Bobbitt* v. *Paramount Cap Manufacturing Company*, 942 F.2d 512, 514 (1991) (plaintiff who secured a $15,000 settlement of her Title VII claim received award for fees incurred in state unemployment benefits proceeding where the work was " 'useful and substituted for work at the judicial stage that would have been ordinarily necessary to a successful outcome' of Bobbitt's civil rights claim"); *McDonald* v. *Armontrout*, 860 F.2d 1456, 1462 (1988) (plaintiffs who prevailed in a Section 1983 action challenging prison conditions compensated under Section 1988 for investigative work performed during a previous habeas corpus proceeding, because the work "obviated the need for comparable work in" litigation challenging the constitutionality of prison conditions and "contributed directly to [its] successful outcome" (brackets in original)); *Jenkins* v. *Missouri*, 862 F.2d 677 (1988) (prevailing parties in school desegregation case awarded fees for work in school district tax levy elections because remedy granted by district court was contingent on passage of tax increases).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner,

v.

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Respondents.

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PETITIONER'S RESPONSE TO THE BRIEF AMICUS CURIAE OF THE UNITED STATES

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The Acting Solicitor General's opposition to the petition for certiorari ("SG Brief") reflects a wholly idiosyncratic view of the principles governing the award of attorneys' fees, not shared by the courts below or, so far as we are aware, any other court. Contrary to this Court's decisions in the area and those of the lower courts, the Acting Solicitor General suggests that attorneys' fees for work in collateral proceedings are not recoverable unless the collateral proceeding is actually litigating the Section 1983 claim or unless the collateral proceeding leads to the entry of a specific affirmative judgment in the 1983 action. (SG Brief at

5-9). That is not the law, and the Acting Solicitor General's effort to rewrite the statute provides no basis for declining to review and resolve a persistent conflict.

1. The Acting Solicitor General argues that "the administrative proceedings at issue here were not proceedings 'to enforce' petitioner's civil rights claim" (SG Br. at 7), a rationale not articulated by either the Court of Appeals or the district court below. While it is quite true that the Federal Energy Regulatory Commission is not charged with adjudicating claims under Section 1983, that agency is charged with adjudicating the identical federal right that formed the basis of the claim here under Section 1983: the right of a federal licensee to operate its hypdropower plant in the manner prescribed in its Federal Energy Regulatory Commission license without interference from conflicting regulatory directives issued by the state. Decisions of this Court and the lower courts are uniform in confirming that an identity in federal rights asserted is sufficient to support an award of attorneys' fees for proceedings in collateral fora, and conflict only with regard to whether those proceedings must be mandated by statute or court order. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (attorneys' fees awarded under Title VII for relief obtained in state court on employment discrimination claim under state law); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986)(fees properly awarded under Clean Air Act for efforts to protect Clean Air Act consent decree during state court litigation and in proceedings before the Environmental Protection Agency); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985)(attorneys' fees awarded under Section 1988 after fee claimant's intervention and assertion of constitutional rights in action brought in state court under Illinois Motor Vehicle Code resulted in state court ruling invalidating state statute and ordering return of confiscated vehicles); *Chrapliwy v. Uniroyal*, 670 F.2d 760 (7th Cir. 1982)(attorneys' fees awarded under Title VII following collateral debarment proceeding brought pursuant to Executive Order 11246 raising employment discrimination claim), *cert. denied*, 461 U.S. 956 (1983). In each of these cases the court ruled that an award

of fees would be proper even though the collateral proceedings were not themselves proceedings under Section 1983 or other similar federal statutes.

2. The Acting Solicitor General places his sole reliance on *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234 (1985), as supposedly supporting his point. *Webb*, however, merely holds that, for purposes of "automatic" entitlement to attorneys' fees under Section 1988, "[a]dministrative proceedings established *to enforce tenure rights created by state law* . . . are not any part of the proceedings to enforce § 1983." 471 U.S. at 241 (emphasis added). *Webb* does *not* purport to determine that federal administrative proceedings brought, as here, to enforce the *federal right* on which the Section 1983 claim rests are not "proceedings to enforce § 1983" within the meaning of the fee-shifting statute.

3. The Acting Solicitor General also suggests that fees cannot be awarded unless the collateral proceeding leads to the entry of a specific affirmative judgment in the 1983 action. See SG Br. at 9 This Court, however, has expressly rejected such a position. In *Maher v. Gagne*, 448 U.S. 122 (1980), the Court considered whether attorneys' fees could be awarded under Section 1988 following settlement of a Section 1983 claim raising both a statutory claim on which a fee award was arguably barred by the Eleventh Amendment, and two constitutional claims not subject to Eleventh Amendment strictures. The Court concluded that neither the lack of a judgment on the merits, nor the claimant's presentation of an arguably "non-fee" claim, supported reversal of the lower courts' award of attorneys' fees. 448 U.S. at 129-33. In so holding, the Court relied on legislative history expressly stating that "attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact'")(quoting legislative history). *Id.* at 132 n.15. The Acting Solicitor General neither acknowledges the *Maher* holding nor explains why a different rule should apply on the mere fortuity that the "non-fee" judgment is

formally obtained in administrative proceedings rather than in the district court.

4. The Acting Solicitor General also asserts that "the decisions on which petitioner relies do not establish a conflict warranting review by this Court." (SG Br. at 9). Notably, he does not, and cannot, deny that the lower courts are in conflict regarding whether collateral proceedings must be mandated by statute or court order before fees are awardable. His contention instead that review is not warranted because petitioner's authorities "were decided before this Court's decision in *Webb*, which clarified the relevant principles" is incorrect because, as shown above, his reading of the law in this area fundamentally misstates the relevant principles. *Webb*, as noted, turns on the fact that the collateral proceeding in that case simply did not raise the federal right later asserted in the Section 1983 action. The collateral proceedings in this case raised just such a right, requiring the Ninth Circuit to decide whether fees nonetheless were not awardable in the absence of a statutory or court mandate referring the parties to an alternative forum. That is an important issue on which the circuits are divided, and on which resolution by this Court is important.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition and in the Reply Brief for Petitioner, certiorari should be granted.

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